11-02-07

Nos. 06-1039 & 06-1204

In the Supreme Court of the United States

ESTATE OF ROGER ROXAS, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

REPUBLIC OF THE PHILIPPINES, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

MICHAEL S. RAAB
SARANG V. DAMLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN B. BELLINGER, III
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTIONS PRESENTED

This interpleader action was brought to settle ownership of certain assets allegedly misappropriated by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed by several parties, including the Philippines (which under Philippine law is the owner of property acquired through the misuse of public office by Philippine officials), a class of judgment creditors of the Marcos estate, and a judgment creditor of Marcos's wife, Imelda Marcos.

In No. 06-1204, *Republic of the Philippines* v. *Pimentel*, the question presented is:

Whether a foreign sovereign that is a necessary party to a lawsuit under Fed. R. Civ. P. 19(a) and has successfully invoked sovereign immunity is, under Rule 19(b), an indispensable party to an action brought in the courts of the United States to settle ownership of assets claimed by that sovereign.

In No. 06-1039, *Estate of Roxas* v. *Pimentel*, the questions presented are:

1. Whether the probate exception to federal court jurisdiction eliminated the district court's jurisdiction over the action.

2. Whether the district court should have dismissed the case because the Estate of Ferdinand Marcos was an indispensable party to the action.

3. Whether the district court lacked jurisdiction over the action because the Pimentel claimants presented no ownership or lien claim against the fund.

4. Whether the court of appeals violated petitioners' right to appeal by failing to address certain of petitioners' arguments.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the views of the United States. In the United States' view, the petition for a writ of certiorari in No. 06-1204 should be granted, and the petition for a writ of certiorari in No. 06-1039 should be held pending disposition of No. 06-1204.

STATEMENT

1. Ferdinand Marcos was President of the Republic of the Philippines (Philippines) for nearly 20 years. In 1972, Marcos created Arelma S.A. (Arelma) under the laws of Panama. Pet. App. 43a.[1] That same year, an account in the name of Arelma was opened at Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) in New York. *Id.* at 45a. The funds placed into that account were allegedly obtained by Marcos through misuse of his public office. *Ibid.*; ER 106, 174-251. Ownership of Arelma is represented by two bearer share certificates that are held in escrow by the Philippine National Bank (PNB), after being transferred there by an order of the Swiss Federal Supreme Court. Pet. App. 43a, 46a, 49a.

The assets in the Merrill Lynch account are the subject of this interpleader action. Arelma claims the assets based on its ownership of the account; PNB's claim is based on its custody of the Arelma bearer share certificates. The Philippines and the Philippine Presidential Commission on Good Government (PCGG) claim the funds under a Philippine statute (Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955)) providing that any property acquired by a public officer through misuse of his office is forfeited to the government *ab initio*.

Respondent Mariano Pimentel represents a class of human rights victims (Pimentel claimants) who obtained a $2 billion judgment against the Marcos estate in February 1995. See *Hilao* v. *Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). The

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[1] Unless otherwise noted, references to "Pet. App." are to the appendix in No. 06-1204. Arelma, S.A. is named in this action as Arelma, Inc. Pet. App. 43a.

Pimentel claimants seek to execute that judgment against the Merrill Lynch account, claiming that Arelma was a shell created to hide Marcos's personal assets. Br. in Opp. 3, 5.

Petitioners Estate of Roger Roxas and Golden Budha Corporation (Roxas claimants) obtained a $19 million Hawaii state court judgment against Imelda Marcos, Marcos's wife, in October 1996, based on claims of torture, imprisonment, and theft of a treasure owned by Roxas. See *Roxas* v. *Marcos*, 969 P.2d 1209, 1231-1233 (Haw. 1998). The Roxas claimants seek to execute their judgment against the Arelma account, and further claim that the money used to fund the Arelma account derives from the stolen Roxas treasure. Pet. App. 31a; 06-1039 Pet. App. 73a-77a.

2. After Marcos's rule ended in 1986, the Philippine government created PCGG to recover Marcos's illegitimate wealth, much of which had been removed from the Philippines. ER 110. In April 1986, PCGG made a request to the Swiss government for mutual assistance, seeking return of Marcos's assets, including the Arelma shares. ER 288, 313. The Swiss government froze those assets and the Swiss Federal Supreme Court upheld the freeze in 1990. ER 348-349.

In 1991, PCGG commenced a forfeiture proceeding against Marcos in the Sandiganbayan, a Philippine court with jurisdiction over political corruption cases, based on the Philippine statute providing for forfeiture of property obtained through misuse of public office. ER 174-251.

In late 1997 and early 1998, while the forfeiture action was pending, the Swiss Federal Supreme Court transferred the frozen assets to an escrow account at PNB pending a final ownership determination by the Philippine courts. ER 289, 347-385. After the Swiss assets were transfered to the PNB escrow account, ER 157-160, PCGG asked Merrill Lynch to transfer the assets it held for Arelma to that account, ER 162, 387. Merrill Lynch declined, noting that the transfer of the

Arelma shares to PNB was provisional only, and that there were a number of other claimants to the fund. ER 393-395.

On September 19, 2000, the Sandiganbayan granted PCGG's motion for partial summary judgment, holding that the assets at issue in the motion were forfeited to the Philippines under Philippine law. ER 254-283. Although the Sandiganbayan later reversed its own decision, the Philippine Supreme Court reinstated the partial judgment in the Philippines' favor on July 15, 2003. ER 597-696.

3. On September 14, 2000, Merrill Lynch commenced this interpleader action in federal district court in Hawaii to settle competing claims to the Arelma account's assets. ER 34. As required by 28 U.S.C. 1335(a), Merrill Lynch deposited the account's assets, $35 million, with the court. Pet. App. 46a.

The Philippines and PCGG asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1604, and moved to dismiss the interpleader action, claiming that their unavailability required dismissal under the rules for compulsory joinder. See Pet. App. 31a-32a; Fed. R. Civ. P. 19(b). The district court instead dismissed the claims of the Philippines and PCGG on the merits, without addressing their claim of sovereign immunity. Pet. App. 32a.

On October 31, 2002, the court of appeals held, on interlocutory appeal, that the Philippines and PCGG were immune from suit in the interpleader proceedings under the FSIA. Pet. App. 36a-39a. The court also found the Philippines and PCGG to be necessary parties who should "be joined if feasible" under Rule 19(a), since "[w]ithout the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected." *Id.* at 40a. While the court noted that the Philippines' and PCGG's unavailability militated in favor of dismissal under Rule 19(b), it also recognized that the Pimentel claimants and Merrill Lynch had competing interests. *Id.* at 41a. Rather than resolve that conflict, the court noted that Merrill Lynch, the Philippines, and

PCGG had agreed to a stay of the interpleader suit pending resolution of claims in the Philippines. *Id.* at 42a. The court ordered entry of a stay, noting that "later developments may render it more equitably feasible for proceedings to go forward in this case," such as "resolution of the litigation in the Philippines" or a change in the parties' immunity status. *Ibid.*

On June 20, 2003, the district court vacated the stay, concluding that the outcome of the proceedings before the Sandiganbayan would not affect the interpleader action because the district court had exclusive jurisdiction over the Arelma assets. ER 697-699. On February 20, 2004, the court of appeals affirmed the lifting of the stay. ER 779-782.

On August 14, 2003, while the appeal from the order lifting the stay was pending, the district court denied the Philippines and PCGG's motion to dismiss the case under Rule 19(b). Pet. App. 55a-60a. The court held that the Philippines and PCGG did not have a "legally protectible claim" that would be impaired by the proceedings because any claim they might have would be barred by New York's statute of limitations. *Id.* at 57a-59a. The court also rejected the claim that the disputed assets were implicated by the just-concluded forfeiture proceeding in the Philippines. The court found that the forfeiture petition filed in 1991 did not "seek[] forfeiture of the assets in the Arelma account at Merrill Lynch," and that the Philippine Supreme Court decision made no mention of Arelma or the Arelma account at Merrill Lynch. *Id.* at 56a.[2] The court further found a lack of proof that the Philippines and PCGG had claimed ownership of the Arelma share certificates. *Ibid.* The court concluded that, in any event, "[o]wnership of the Arelma share certificates is irrelevant to this proceeding since Arelma is a party actively seeking control of the assets at

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[2] The Philippines and PCGG contend that the 1991 forfeiture petition did in fact seek forfeiture of the Arelma shares and its assets. 06-1204 Pet. 4. The forfeiture petition does refer to Arelma and the Merrill Lynch account, though not in the context of a specific request for forfeiture. ER 234.

issue and Arelma's shareholders have no standing to pursue assets allegedly belonging to the corporation." *Id.* at 57a.

The district court held a bench trial to adjudicate the remaining claims to the Arelma account, and on July 12, 2004, awarded the entirety of the Arelma assets to the Pimentel claimants. Pet. App. 43a-54a. The court noted that the Pimentel claimants' judgment was against Marcos personally, rather than Arelma. *Id.* at 49a. However, the court found that because Arelma was merely the "*alter ego* and instrumentality of Ferdinand E. Marcos," it could "reverse" pierce the corporate veil and find that the proceeds of the account held at Merrill Lynch were in fact owned by Marcos. *Id.* at 52a, 54a. For the same reason, the court rejected the separate claim of Arelma to the funds. *Id.* at 54a.

The district court also rejected the claims of the other claimants. It found that PNB "lack[ed] standing" to claim the assets in its capacity as escrow holder of the Arelma shares because "[a]n individual shareholder, by virtue of ownership of shares, does not own the corporation's assets." Pet. App. 52a (quoting *Dole Food Co* v. *Patrickson*, 538 U.S. 468, 475 (2003)). The court also rejected the claim of the Roxas claimants, finding that they had not proved that the assets in the Arelma account derived from property stolen from Roxas, and that their claims were, in any event, inferior to those of the Pimentel claimants. *Id.* at 49a, 53a-54a; ER 944.

4. On July 19, 2004, the Philippines and PCGG filed a motion with the Sandiganbayan, as part of the forfeiture proceedings begun in 1991, claiming that the "ARELMA account is now ripe for forfeiture." See Request for Judicial Notice, Ex. A at 9. It thus prayed that "judgment be rendered declaring the funds, properties, shares in and interests of ARELMA, wherever they may be located, as ill-gotten assets and forfeited in favor of the Republic of the Philippines." *Ibid.* That motion is still pending before the Sandiganbayan.

5. The Philippines and PCGG appealed the denial of their motion to dismiss under Rule 19(b). Arelma, PNB, and the Roxas claimants appealed the award of the assets to the Pimentel claimants. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that in "the usual case of interpleader" a sovereign party that cannot be joined due to immunity "is indispensable and so can cause dismissal of the action." *Id.* at 6a. Here, however, the court held that other factors outweighed the Philippines' and PCGG's immunity.

The court of appeals found that the Philippines' failure to obtain a judgment in the Philippines as to the ownership of the assets, even though the Arelma shares had been in escrow at PNB since 1995, was "an equitable consideration * * * to be taken into account." Pet. App. 7a. The court recognized that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. But the court concluded that the Philippines would not be prejudiced by the interpleader action because "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Id.* at 7a. The court reasoned that any action by the Philippines against Merrill Lynch would be barred by New York's six-year statute of limitations for actions based on misappropriation of public property. *Id.* at 8a-9a (citing N.Y. C.P.L.R. 213 (McKinney Supp. 2007)).

Responding to the Philippines' contention that "it could obtain a judgment regarding the ownership of these assets in the Philippines where it is relieved of any statute of limitations," the court of appeals concluded that the Philippine courts "would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. Accordingly, if a Philippines court issued such a judgment, a court in this country "would not be bound to give it effect," and the assets could not be "finally disposed of except by judgment of a court in the United States." *Id.* at 7a-8a.

In considering the adequacy of the judgment in the absence of the Philippines and PCGG, the court found that the award would have some "symbolic significance" to the "victims of the former president of the Republic." Pet. App. 9a. Although most of the Pimentel claimants were Philippine citizens who "should find redress from their own government," the court found that consideration to be "outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the[ir] president." *Id.* at 9a-10a. The court also concluded that the Pimentel claimants would have no forum in the Philippines in which to raise their claims to the Arelma assets. *Id.* at 10a.

After balancing the factors, the court of appeals concluded that "[n]o injustice" would be done to the Philippines "if it now loses what it can never effectually possess." Pet. App. 10a. The court therefore affirmed the award of the Arelma assets to the Pimentel claimants, and also rejected claims of error raised by the Roxas claimants. *Id.* at 10a-11a.

DISCUSSION

The Ninth Circuit's indispensibility analysis under Rule 19(b) was flawed in significant respects. The court gave insufficient weight to the absent parties' sovereign immunity from suit, and improperly (and incorrectly) prejudged the merits of the immune parties' claims. The Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals. The decision also raises significant concerns with respect to the Nation's foreign relations. It prejudices ongoing litigation in the Philippines regarding a matter of great public concern to that country, conflicts with an understanding between the Philippines and Switzerland regarding adjudication of the Marcos assets, and threatens to undermine the ability of the United States to enforce its forfeiture judgments abroad as well as to assert sovereign immunity in foreign courts in similar circumstances. The United States therefore recommends

that the certiorari petition filed by the Philippines and PCGG (No. 06-1204) be granted, and that the petition in No. 06-1039 be held pending disposition of No. 06-1204.

I. THE COURT OF APPEALS' APPLICATION OF RULE 19(b) WITH RESPECT TO IMMUNE ABSENT PARTIES WARRANTS THIS COURT'S REVIEW

Federal Rule of Civil Procedure 19 provides for mandatory joinder of persons "needed for just adjudication." Rule 19(a) describes persons who must be joined in an action if feasible. For example, under Rule 19(a)(2)(i), if a person "claims an interest relating to the subject of the action" and "disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest," that person must be joined.

If a person described in Rule 19(a) cannot be made a party for some reason, the court must determine, under Rule 19(b), "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party thus being thus regarded as indispensable." Rule 19(b) includes four "factors" to consider in such a case:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"The decision whether to dismiss * * * must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118-119 (1968) (*Provident Bank*).

In its first opinion in this case, the court of appeals held that the Philippines and PCGG are immune from jurisdiction under the FSIA. Pet. App. 30a-39a.[3] The court further held that the Philippines and PCGG are parties that should be joined if feasible, and that it was "difficult to see how this interpleader action can proceed in their absence." *Id.* at 40a-41a. On that basis, the court of appeals entered a stay pending future proceedings in the Philippines. *Id.* at 42a.

Later, however, the court of appeals concluded that the absence of the Philippines and PCGG did not require that the interpleader action be stayed or dismissed under Rule 19(b). Pet. App. 6a-10a. That decision failed to take appropriate account of the fact that the Philippines' and PCGG's absence is due to their immunity from suit, and was premised on other legal errors as well. Its ruling, which conflicts with the approach of other courts of appeals and interferes with significant foreign policy interests, warrants this Court's review.

A. The Immunity Of An Absent Party Is A Very Significant Consideration In The Analysis Under Rule 19(b)

This Court has recognized the importance of sovereign immunity to the Rule 19 analysis in cases where the United

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[3] Respondents do not challenge the determination that the Philippines and PCGG have immunity to this interpleader action. We note that in *Cory* v. *White*, 457 U.S. 85 (1982), the Court held that the Eleventh Amendment barred an interpleader suit seeking "resolution of inconsistent tax claims by the officials of two States." *Id.* at 86, 91. In two more recent cases, *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), and *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Court held that the Eleventh Amendment did not bar a federal court from exercising in rem jurisdiction with respect to a bankruptcy estate or a shipwrecked vessel. In both cases, however, the Court's analysis emphasized the fact that the district court was exercising in rem jurisdiction pursuant to a specific constitutional grant of federal authority over the res. *Hood*, 541 U.S. at 446-451 (bankruptcy); *Deep Sea Research*, 523 U.S. at 501, 506-507 (admiralty). Here, in contrast, there is no specific constitutional grant of authority over the res, and the federal court's power to adjudicate the claims therefore stems solely from its jurisdiction over the claimants, as to which a party may assert its immunity.

States is the absent party. See *California* v. *Arizona*, 440 U.S. 59 (1979); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945); *Minnesota* v. *United States*, 305 U.S. 382, 386-388 (1939); see also 7 C. Wright et al., *Federal Practice and Procedure* § 1617, at 254 (2001) (Wright & Miller) ("No doubt because of the sovereign-immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests."); 4 J. Moore et al., *Moore's Federal Practice* § 19.05[2][c] at 19-91 (2006) (*Moore's*) ("[C]ourts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee's waiving an immunity to suit.").

Similarly, a number of courts of appeals have held that an absent party's sovereign status is entitled to special weight under Rule 19(b). For example, in dismissing a suit where the absent party was an Indian Tribe, the D.C. Circuit stated: "This is not a case where some procedural defect such as venue precludes litigation of the case. Rather the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (1986); see *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir.) (recognizing the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19"), cert. denied, 502 U.S. 818 (1991); *Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (where "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves") (internal quotation marks omitted).

That is not to suggest that an immune sovereign is automatically indispensable. For instance, in some cases the interests of the absent sovereign may be properly and adequately protected by the parties remaining in the suit, and in

others relief may be structured so as not to prejudice the absent party. See, *e.g.*, *Wichita & Affiliated Tribes*, 788 F.2d at 774; cf. *Heckman* v. *United States*, 224 U.S. 413, 444-445 (1912) (finding that interests of absent Indian grantors were adequately represented by the United States). But even though the Philippines' and PCGG's immunity was not in itself outcome determinative under Rule 19(b), it should have received far greater weight than it did. Indeed, the court of appeals recognized that its analysis conflicts with the approach of other courts of appeals on this issue. See Pet. App. 61a-62a.

B. The Court Of Appeals' Rule 19(b) Analysis Was Flawed In Other Respects As Well

1. Central to the court of appeals' reasoning concerning the first factor in Rule 19(b) was its conclusion that the Philippines and PCGG would not be prejudiced by a judgment rendered in their absence because they had "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. The court found that any claim by the Philippines to the assets would be barred by New York's six-year statute of limitations for misappropriation of public funds. *Id.* at 8a-9a (citing N.Y. C.P.L.R. 213 (McKinney Supp. 2007)). By resting its analysis so heavily on its assessment of the merits of the Philippines' and PCGG's claims, the court in effect deprived them of the benefit of their sovereign immunity.

While this Court has not ruled out consideration of the underlying merits of a claim in the course of determining the extent of prejudice to an absent party from adjudication without his participation, see *Provident Bank*, 390 U.S. at 115 (noting that it would have been proper to explore the likelihood that claims against the absent party would result in recoveries against him and therefore claims by him against the fund), it is particularly problematic for a court to assess the merits of an absent party's own claim when the party's absence is due to its sovereign immunity from the court's juris-

diction. The immune party would either have to participate in the litigation (despite its immunity) in order to argue the merits of its claim, or risk the possibility that the court will, as here, underestimate the strength of the party's interest and evaluate the absent sovereign's claim based on the arguments of the present and hardly disinterested other litigants.

In this case, moreover, the lower courts' assessment of the strength of the immune parties' interests was mistaken. Contrary to the court of appeals' assumption that the Philippines would have to sue Merrill Lynch in New York court to litigate its claim that Marcos obtained the assets illegally, that claim by the Philippines can properly be litigated in a Philippine court. The Philippines' claim to Arelma and its assets is based on Philippine law providing that property misappropriated by public officers through abuse of their office is forfeited to the Philippines from the moment it is obtained. Pet. App. 2a-3a. A special Philippine court—the Sandiganbayan—is vested with authority to adjudicate disputes under that statute. Indeed, the Philippines and PCGG are presently seeking forfeiture of the Arelma shares and Arelma's assets in that court, and a fully briefed motion for summary judgment with respect to those assets is pending before it.

If the Sandiganbayan awards the Arelma shares and assets to the Philippines, there is no reason to assume that the Philippines would have to sue Merrill Lynch to obtain the assets in Arelma's Merrill Lynch account. Rather, the Philippines, either directly or through Arelma, would simply request that Merrill Lynch transfer the assets in Arelma's account to an account in the Philippines. If Merrill Lynch were to refuse, the Philippines (or Arelma) might have to bring suit, but the suit would be based on that new breach of contract, not on the underlying claim (already adjudicated by the Sandiganbayan) that Marcos obtained the original assets illegally.

The court of appeals believed that "a court of this country would not be bound to give * * * effect" to a judgment by

the Sandiganbayan regarding ownership of the Arelma account and its assets because "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. The court erred in announcing so categorical a rule regarding a claim that would be better evaluated when a U.S. court has before it an actual judgment by a Philippine court. It is unnecessary for this Court to decide whether a court in the United States would *always* be bound by a foreign court's judgment of forfeiture. It is sufficient to recognize that the court's categorical rule that United States courts would *never* enforce a foreign judgment of forfeiture relating to assets located in the United States is erroneous.

There are without question instances in which a foreign judgment of forfeiture relating to assets located in the United States may be recognized and enforced by a court here. Indeed, a federal statute specifically provides for enforcement of foreign judgments of forfeiture in certain circumstances. See 28 U.S.C. 2467(c) (upon certification by the Attorney General, "the United States may file an application on behalf of a foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States"). Further, the Treaty on Mutual Legal Assistance in Criminal Matters (MLAT), Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995), and chapters IV and V of the United Nations Convention Against Corruption, G.A. Res. 4 (LVIII), U.N. Doc. A/RES/58/4, at 22, 32 (2003), contemplate cooperation by the two countries on proceedings related to asset forfeiture.

The MLAT, for example, generally requires the parties, as permitted by their domestic law, to assist each other when the object of a forfeiture proceeding in one country is located within the other country. The MLAT presupposes the existence of jurisdiction of Philippine courts over assets located

in the United States, and vice versa. And, in fact, courts in the United States do sometimes exercise jurisdiction in civil forfeiture proceedings over property located outside the United States. See 28 U.S.C. 1355(b)(2) ("Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, * * * an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.") (footnote omitted).[4]

Moreover, even assuming arguendo that the Philippine courts could not adjudicate ownership of the actual assets held in the Merrill Lynch account, it is undisputed that the Philippine courts have jurisdiction to determine the ownership of Arelma itself, as the share certificates are being held in escrow in the Philippines. If ownership of Arelma were awarded to the Philippines by the Sandiganbayan, there is no reason to assume, as the court of appeals did, that a court in the United States would refuse to recognize that judgment.

The court of appeals' analysis of the first Rule 19(b) factor also failed to take into account the logical priority of the Philippines' and PCGG's claims over those of the Pimental claimants. The Pimentel claimants do not assert that they are the rightful owners of the assets in Arelma account. Rather, as holders of a judgment against the Marcos estate, the Pimentel claimants ask the court to ascribe the Arelma assets to the Marcos estate through "'reverse piercing' of the corporate veil," and then to award those assets to them in partial satisfaction of their judgment against the Marcos estate. Pet. App. 52a. Thus, the Pimental claimants' claim depends upon a determination that the assets are really Marcos assets. If the Sandiganbayan determines that Arelma and its assets are

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[4] If the Philippine judgment did not qualify for enforcement under Section 2467(c), there would be a further question whether the judgment would qualify for recognition under principles of international comity. See *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895).

forfeited under Philippine law, it would mean that those assets have been owned by the Philippines since the time Marcos first obtained them.[5] The claims of the Pimentel claimants against those assets would thereby be vitiated. They would then be seeking to execute a judgment that they possess vis-a-vis *Marcos* against assets of the *Philippines*.

2. The court of appeals' erroneous conclusion that the Philippines would not be prejudiced by continuation of the interpleader action led it to give no consideration to the second Rule 19(b) factor: "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Pet. App. 9a. This case involves mutually exclusive claims to a common fund: the Philippines and PCGG claim the entire amount as property of the Philippines, the Pimentel claimants' judgment far exceeds the value of the Arelma assets, and the Roxas claimants' judgment represents over half the amount of the assets. In such a situation, as the court of appeals recognized in its initial ruling, *id.* at 40a, it would be nearly impossible to shape relief so as to avoid harm to the absent parties. See *Provident Bank*, 390 U.S. at 115; see also 4 *Moore's* § 19.05[3], at 19-94 to 19-95 (noting possibility of partial distribution of undisputed portion of fund or requiring that security be posted for the disputed amount).

3. The court of appeals also misinterpreted the third Rule 19(b) factor—"whether a judgment rendered in the person's absence will be adequate." The third factor "refer[s] to the

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[5] Such a ruling would be consistent with well established domestic forfeiture law. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for example, provides that "[a]ll right, title, and interest in [forfeited] property * * * vests in the United States upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C. 1963(c). See also 18 U.S.C. 981(f); 21 U.S.C. 853(c). Congress, in RICO, "devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit property to the United States." *United States* v. *BCCI Holdings (Lux.), S.A.*, 46 F.3d 1185, 1191 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995).

public stake in settling disputes by wholes, whenever possible." *Provident Bank*, 390 U.S. at 111; see *Davis ex rel. Davis* v. *United States*, 343 F.3d 1282, 1292-1293 (10th Cir. 2003), cert. denied, 542 U.S. 937 (2004). That factor "promotes judicial economy by avoiding going forward with actions in which the court may end up rendering hollow or incomplete relief because of the inability to bind persons who could not be joined." 7 Wright & Miller § 1608, at 114.

Rather than focusing on "the public stake in settling disputes by wholes," the court of appeals considered only whether the judgment would be adequate to the "victims of the former president of the Republic" by satisfying a small portion of their $2 billion judgment. Pet. App. 9a. But, it is clear that the court's judgment would not satisfy "the public stake in settling disputes by wholes." Indeed, the court of appeals recognized that because "any judgment entered in this action cannot bind the Republic," the Philippines and PCGG "would remain free to sue for the Arelma assets in a forum of [their] choice." *Id.* at 8a. The court even suggested that "the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested." *Id.* at 8a-9a.

That reasoning directly contravenes the purposes of both Rule 19 and interpleader. This Court has noted that where multiple parties "assert conflicting claims to a common fund," a suit by any one of those parties "implicates all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-738 (1977); see 7 Wright & Miller § 1618, at 274-275 ("When a particular fund

or property right is involved in litigation, federal courts must be especially sensitive to the danger of contradictory judicial orders relating to that fund or right.").

Interpleader is likewise intended to allow a party faced with multiple claims to a res to avoid multiple liability by resolving the controversy in a single consolidated proceeding. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 533 n.15, 534 n.16 (1967) ("the classic situation envisioned by the sponsors of interpleader" was one where the stakeholder was "faced with conflicting but mutually exclusive claims to a policy"); 7 Wright & Miller § 1702, at 534-535. As the court of appeals recognized in its earlier decision, "[w]ithout all significant claimants in an interpleader action, its purpose is materially frustrated." Pet. App. 41a.

4. As a number of courts have recognized, the fact that a party is absent due to its immunity from suit largely obviates the fourth factor in the Rule 19(b) analysis—"whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." "[T]he plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis*, 343 F.3d at 1293-1294; see *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48 (2d Cir. 2004), cert. denied, 126 S. Ct. 2351 (2006); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 480-481 (7th Cir. 1996); *Wichita & Affiliated Tribes*, 788 F.2d at 777. That is especially so in this case, because the Pimentel claimants assert an interest only as judgment creditors, not as persons claiming ownership of the assets, and because the vast majority of the Pimentel claimants are Philippine citizens who, as the court of appeals recognized, ordinarily "should find redress from their own government." Pet. App. 9a.

Indeed, the Ninth Circuit itself has repeatedly held that the lack of an adequate alternative remedy for a plaintiff is less significant when the absent party is immune from suit,

because the inability to bring suit is a "common consequence of sovereign immunity, and the [immune party's] interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *American Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (2002); see *Wilbur* v. *Locke*, 423 F.3d 1101, 1115 (2005), cert. denied, 546 U.S. 1173 (2006); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162, cert. denied, 537 U.S. 820 (2002); *Confederated Tribes of the Chehalis Indian Reservation* v. *Lujan*, 928 F.2d 1496, 1500 (1991).

Here, the court of appeals acknowledged that sovereign status of the absent party is a "powerful consideration" in indispensability analysis. Pet. App. 7a. However, contrary to its own circuit precedent, it placed heavy emphasis on the fact the Pimentel claimants would have "no forum within the Philippines open to their claims," *id.* at 10a, giving no consideration to the competing interest of the Philippines and PCGG in maintaining their sovereign immunity.

C. The Court Of Appeals' Decision Threatens To Impair The Nation's Foreign Policy Interests

The court of appeals' decision threatens to undermine significant interests of the United States. The United States has a strong interest in the proper application of principles of foreign sovereign immunity, a matter of great sensitivity in foreign relations both because of its impact on foreign states and because of the United States' own interests relating to reciprocity. See *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). More particularly, the United States has an interest in ensuring that property to which it has a significant claim will not be awarded to others by a foreign court that has no jurisdiction over the United States because of sovereign immunity. And the United States has an interest in cooperating with foreign governments in their efforts to repatriate assets misappropriated by their former leaders.

This case itself reflects such international cooperation in the agreement of the Swiss government and courts to transfer Marcos-related assets in Switzerland, including the Arelma bearer share certificates, to PNB to hold in escrow pending a determination by a Philippine court whether those assets are ill-gotten, and therefore forfeited. For a court in the United States, in effect, to nullify those proceedings by transferring the Arelma assets to Marcos creditors, without awaiting a determination whether the assets are, in fact, assets of the estate or of the Philippine government, frustrates the cooperative efforts of the Philippine and Swiss governments for an orderly procedure to repatriate the wealth stolen from the Philippines by its former leader. Indeed, the Swiss and Philippine governments have each expressed concern that the court of appeals' decision will undermine multilateral anti-corruption cooperation. See Pet. App. 65a-66a; No. 06-1204 Pet. Reply App. 1a-2a. Those concerns provide additional reason for this Court to review the court of appeals' decision.

II. THE COURT OF APPEALS CORRECTLY REJECTED THE ARGUMENTS OF THE ROXAS CLAIMANTS

The Roxas claimants contend that the probate exception divested the district court of jurisdiction to distribute the Arelma assets once it found that they were the property of the Marcos estate. But the probate exception has no application here. As this Court recently explained, the probate exception "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court" and "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Marshall* v. *Marshall*, 547 U.S. 293, 311-312 (2006). Here, the district court was not attempting to probate a will or administer an estate, and the assets from the Arelma securities account at Merrill Lynch are not in the possession of a state court, but are in the registry of the district court.

The Roxas claimants also contend that the district court lacked jurisdiction over the interpleader action because the Pimentel claimants were not "adverse" to the interpleaded fund. 06-1039 Pet. 19-20. However, 28 U.S.C. 1335(a)(1) requires only "[t]wo or more adverse claimants" to the fund to support jurisdiction. As the Roxas claimants acknowledge, there are at least two adverse claimants to that fund. 06-1039 Pet. 22. Moreover, the argument that the Pimentel claimants were not "adverse" to the fund because their claim is not based on a "direct tie" to the money (*id.* at 20) is incorrect; there is no need to establish a "direct tie" to have an "adverse" claim to an interpleaded fund, and the Roxas claimants do not cite any authority suggesting otherwise.

The Roxas claimants assert in passing that the Marcos estate was an indispensable party to the interpleader proceeding, and that therefore the case should be dismissed under Rule 19(b). It does not appear that that argument was fully briefed before the court of appeals. In any event, the premise of the argument is incorrect: Imelda Marcos and the Marcos estate were not absent within the meaning of Rule 19(b)—both were served with the interpleader complaint, but neither one made an appearance, and a default was entered against them. Pet. App. 44a; ER 38.

Nonetheless, if the Court grants the petition for a writ of certiorari in No. 06-1204, it should hold the petition in No. 06-1039, because, if the Court holds that the interpleader suit should be dismissed, reversal of the judgment below would affect the Roxas claimants as well.

CONCLUSION

The petition for a writ of certiorari in No. 06-1204 should be granted. The petition for a writ of certiorari in No. 06-1039 should be held pending disposition of No. 06-1204.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

JOHN B. BELLINGER, III
Legal Adviser
Department of State

MICHAEL S. RAAB
SARANG V. DAMLE
Attorneys

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